IN THE HIGH COURT OF JUDICATURE AT BOMBAY
O. O. C. J.

**COMPANY PETITION NO.343 OF 2001**
**WITH**
**COMPANY APPLICATION NO.19 OF 2005**

Gujarat Sidhee Cement Ltd. Petitioners

vs.

Rainbow Corporation Ltd.
(Formerly known as V.K.
Industries Ltd.) Respondent

Mr.M.P.S.Rao with Mr.Harish Pandya i/b.M/s.Crawford Bayley & Co. for the petitioners.

Mr.Debashis Mitra for Official Liquidator.

**CORAM : ANOOP V. MOHTA,J.**

**DATED : 31st August, 2007**

**ORAL JUDGMENT:**

The present petition is filed on the basis that the respondent Company is unable to pay its debts and, therefore, it is just & equitable to wind-up the company. The company is indebted to the petitioner in the sum of Rs.3,23,92,000/- (Rupees Three crores twenty three lac ninety two thousand only) alongwith interest thereon at the rate of 1.5% per month compounded with monthly rests.

2. In June, 1998, pursuant to the diverse transactions entered into between the petitioner and the company a sum of over Rs.5 crores was found due and payable by the

company to the petitioner.

3. On 22nd September, 1998, an agreement was arrived at between the parties whereby the company acknowledged and admitted its liability and agreed to pay to the petitioner a sum of Rs.5,68,92,000/-. The terms and conditions agreed upon between the parties were reduced to writing. A Memorandum of Understanding dated 22nd September, 1998 (hereinafter referred to as the said "MOU") was arrived at and executed by and between the parties. Under the said MOU and more particularly in clause (3) therein, the company admitted and acknowledged that the debts and agreed balance was crystalised on the basis of the meetings held on 30th June, 1998 and 8th May, 1998. Clause (3) of the Agreement records the mode and manner of payment by the company to the petitioner i.e. (a) a sum of Rs.2,84,46,000/- was to be paid before 10th October, 1998; and (b) the balance of Rs.2,84,46,000/- would be payable in instalments on or before 31st March, 1999. The company accordingly forwarded to the petitioner its cheques drawn on Union of Bank of India, Bombay Samachar Marg Branch, Bombay in favour of the petitioner. Further cheques were also drawn for the period 14th November, 1998 to 18th March, 1999. The said MOU was signed by Mr.V.K.Agarwal, the Managing Director and the Authorised Signatory on behalf of the company and by

Mr.I.K.Agarwal on behalf of the petitioner.

4. By a letter, in response to the petitioner's letter dated 28th January, 1999, the company recorded to make payment of a sum of Rs.1,50,00,000/- to Rs.2,00,00,000/- by February 1999 and Rs.1,00,00,000/- in the month of March 1999, and the balance before April 1999. The company also recorded that in the event of any business materialising they would adjust half of the amount under such business deal towards the outstanding dues of the petitioner. The company requested the petitioner to extend its co-operation for clearing its outstanding dues to the petitioner. The company failed and neglected to make any payment to the petitioner. As a result, the petitioner called upon the company to make payment of its dues and held several meetings to ensure payment by the company of the dues of the petitioner.

5. Pursuant to the meetings, between the petitioner and the company, a Supplemental Agreement dated 6th May, 1999, has been entered into between the petitioner and the company. Under the Supplemental Agreement it has been recorded by and between the parties, its admitted liability to pay a sum of Rs.5,68,92,000/- to the petitioner on a time bound schedule alongwith interest thereof. It has also been interalia, recorded that the entire amount would be payable on or before 31st March,

1999. Under the Supplemental Agreement, it has also been agreed that the 14 dishonoured cheques under the said MOU dated 22nd September, 1998, would be returned to the company. The company handed over fresh cheques to the petitioner for payment of their dues to the petitioner in the sum of Rs.4,08,92,000/-.

6. On 29th February, 2000 despite the execution of the Supplemental Agreement, the company as aforesaid was irregular in making payment to the petitioner agreed by it in the said Supplemental Agreement dated 6th May, 1999. Clause 14 of the Supplemental Agreement enjoins the company to create a charge of the assets of the company as well as ESTECO Group of Companies. The company has also furnished an Affidavit dated 29th February, 2000, agreeing to create a charge on the companies assets as also to create a mortgage of its immovable assets in favour of the petitioner on the basis that the company was liable to, and indebted to the petitioner of its dues.

7. On 27th July, 2000, the cheques issued by the Company for aggregate sum of were all dishonoured when presented for payment. The cheques were duly dishonoured with a remark "insufficient funds". The petitioner’s Advocates initiated steps against the company and its directors for the dishonour of the

aforesaid cheques issued by the company. The petitioner's Advocates issued notice under the provisions of the Negotiable Instrument Act, 1881 and the Indian Penal Code to prosecute the Company and its directors for prosecution for the dishonour of the cheques in their nine separate proceedings were instituted in the Court of Metropolitan Magistrate. The said proceedings are pending in the Metropolitan Magistrate Court.

8. On 24th August, 2000 in respect of the notices issued by the petitioners Advocates, the company by its Advocates' letter bearing Reference No.SCM/BDC/SM/1408/2000 dated, inter-alia, denied the allegations, contentions and statements contained in the letter.

9. On 22nd August, 2000 the petitioner's Advocate addressed letters to the company as well as to the Chairman of the company, Mr.V.K.Agarwal, inter-alia, narrating the entire sequence of events and also calling upon the company as well as its directors to make payment of the dues of the petitioner. The notice of the director was addressed to him on the basis of the said director guaranteed due repayments of all outstandings of the company in his personal capacity as contained in the Supplemental Agreement dated 6th May,

1999. Despite the aforesaid letters, the company has not responded to the statutory notice addressed to the company by the petitioner. The company has admitted and acknowledged all its liabilities to pay to the petitioner the amount due and payable pursuant to the clinkers cement and/or cement supplied to the petitioner by the company but for the first time in its Advocates' letter dated 24th August, 2000, sought to raise false and frivolous references when not existed. There is now due and payable a sum of Rs.3,23,92,000/- along with interest thereon at the rate of 1.5% per month compounded monthly as on 22nd June, 2000. On 30th November, 2000, a sum of Rs.5,09,15,672.00 comprising of the principal sum of Rs.3,23,92,000/- along with interest thereon at the rate of 1.5% per month compounded monthly of Rs.1,85,23,672.00 is due and payable by the company to the petitioner along with interest at the rate of 1.5% per month compounded monthly on the principal sum of Rs.3,23,92,000/- from 1st December, 2000 till payment of realisation thereof. The company also failed and neglected to reply the statutory notice dated 22nd August, 2000, as addressed by the petitioner's advocates to the company. The company is, therefore, deemed to unable to pay its debts and to be wound-up by this Court.

10 As noted above, the respondent-company though served

with the various notices including statutory notice, unable to make the payment of the amount due and payable. The petitioners therefore have no option, but to invoke the provisions of Sections 433, 434 and 439 of the Companies Act, 1956. The respondent-company by affidavit dated 25.8.2001 resisted the admission on various grounds but without any supporting material.

11. There is further rejoinder filed by the petitioners re-iterating the stand already taken in the main petition. The response, even if raised, in view of the above facts and circumstances in no way has affected the basic case of the petitioners in view of the various statements recorded even in writing in reference to the admission of the amount due and payable. The respondents in various correspondences have acknowledged their liability. Some of them are as under:

(a) Exhibit "B" is letter dated 19.1.2000 and wherein it is stated "Further, we want to state that as of today we are not in a position to give you precise date for deposition of cheque given to you, as per Memorandum of Understanding dated 22nd September, 1998, but we assure you that as soon as we receive funds from any of the sources we will be clearing your outstanding."

(b) Exhibit "C" is letter dated 28.1.1999 and wherein it

is stated " We wish to inform you that we are hopeful to clear approximately Rs.1.5 to Rs.2 crores by the end of February, 1999 and Rs.1 crores in the month of March, 1999 and the balance during April, 1999."

(c) Exhibit "D" is supplement agreement dated 6th May, 1999 of which clause 5 is as under:

12. With regard to the total sum of Rs.4,08,92,000/- (Rupees Four Crores Eight lakhs Ninety Two Thousand only) as set out under Serial No.2 hereinabove VKIL has given post-dated cheques details of which are given in the Annexure of this Agreement.

PAYMENT SCHEDULE

| | |
|---|---|
| April-June 99 | 2,04,46,000 |
| July-September | 1,02,23,000 |
| October-December 99 | 1,02,23,000 |
| | --- |
| | 4,08,92,000 |
| | ========== |

d) Exhibit "F" is letter dated 22nd June, 2000 wherein it is stated "We refer to the Memorandum of

Understanding (MOU) dated 22.09.1998 and the Supplemental Agreement dated 6th May, 2000. Out of the total outstanding of Rs.568.92 lakhs we have so far cleared Rs.245 lakhs. As on date there is still a balance amount of Rs.3,23,92,000/- payable to you."

13. The respondent-company by letter dated 24.8.2000 inspite of admission have raised various defences which, after going through the same, in my view, is unsustainable. Even after adjustment, there remained no doubted in view of the clear admission made that the amount was due and payable more than Rs.3 crores. Admittedly there was no proceeding raised or initiated by the respondent-company at any earlier point of time except by raising such pleas of adjustment and/or of outstanding first time after a demand made by the petitioner of the dues in question. Admittedly, there is no reply to the last statutory notice dated 22.8.2000.

14. The claim, therefore, on the date of filing of the petition as recorded in Exhibit "C" as on 30.11.2000 remained to be Rs.5,09,15,672 which is inclusive of principal sum due and outstanding as on 30.11.2000 i.e. Rs.3,23,92,000/-.

15. The petitioner has in fact moved a Company

Application no.19/2005 for appointment of Provisional Liquidator. After considering the affidavit and the averments made in the application, this Court by order dated 18.2.2005 has granted ad-interim order in terms of prayer (a). That interim order has been in force since then. There is no challenge even to that order. There is no response or opposition to that proceeding also.

16. The claim as raised is within limitation.

17. Taking all this into account including the so-called defences raised this Court on 11th June, 2004 after hearing both the parties has admitted the petition. The petitioners have complied with all the necessary formalities as required under the law. The necessary affidavits are part of record.

18. None appeared for the respondent-company though the matter has been in the list of final hearing board since 20.7.2007. It was adjourned from time to time for the response.l On 24.8.2007 as last chance was given in the matter and in fact it was kept for disposal. None appeared for the respondent today again.

19. In view of uncontroverted position and the clear admissions on the part of the respondent-company, in so far as the liability in question is concerned, there is

no doubt that the petitioner has made out a case as contemplated under the provisions mentioned.

20. Resultantly, the petition is allowed in terms of prayers (a) and (b). There shall be no order as to costs.

21. In view of disposal of Company petition, Company Application No.19/2005 is also disposed of accordingly.

[ANOOP V. MOHTA,J.]